

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 682 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

JASUBHAI MOHANBHAI SOLANKI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 682 of 1993
MR AM VERMA with MR MM TIRMIZI for Petitioner No. 1
(MR VIVEK BAROT) for Petitioner No. 1
PUBLIC PROSECUTOR for Respondent No. 1
-

CORAM : MR.JUSTICE M.C.PATEL
and
MR.JUSTICE A.L.DAVE

Date of decision: 18/03/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. The appellant was tried by City Sessions Court, Ahmedabad along with co-accused Hasubhai alias Ashok Chamanlal Makwana (since acquitted) for offences punishable under Sections 302, 120B, 114 of IPC and Section 135(1) of Bombay Police Act and came to be convicted for offence punishable under Section 302 of IPC and sentenced to life imprisonment and to pay a fine of Rs.500/-. In default, to suffer R.I. for two months by virtue of judgement and order rendered in Sessions Case No.358 of 1991 on 13-05-1993.

2. Facts leading to the present appeal can be stated thus:

2.1 On 3rd June, 1991 at about 1.30 hrs, present appellant and one Hemant Kantilal Patel went to a fast food stall known as Jagannath Bhaji-Pau located near Kankaria Chopati in Ahmedabad City. They went in an auto-rickshaw which was driven by the co-accused Hasubhai alias Ashok Chamanlal Makwana. As per the prosecution case, while the present appellant and deceased Hemant Kantilal Patel were at the stall, they placed an order for some food and after the food was served the present appellant rose from his seat, went behind Hemant Kantilal Patel and then drew a dagger from under his shirt and inflicted a blow on Hemant Kantilal Patel in the abdomen while standing behind him. On his inflicting injury, Hemant Kantilal Patel stood and started running away. The appellant also ran towards the rickshaw with dagger in his hand, occupied the rickshaw and went away. As circumstances would have it, brother of Hemant Kantilal, Deepak Kantilal in company with one Umesh Bhikhubhai Patel was sitting in another fast food stall. They had noticed the appellant and the deceased arriving in an auto-rickshaw and sitting at Jagannath Bhaji-Pau Stall. They saw the incident and, therefore, they ran towards their scooter to follow the appellant, who was escaping in the auto-rickshaw. The scooter took time to start. However, they tried to chase the appellant, but in vain. After trying to locate the rickshaw in which the appellant had escaped, they returned to the spot and found that the deceased Hemant Kantilal, who had started running from the spot was lying on the road dead. They, therefore, rushed to Kagdapith Police Station and Deepak lodged the complaint. On the basis of the complaint, an FIR was registered and investigation started. It is the

case of the prosecution that the appellant surrendered to the police along with the dagger. A panchnama was drawn in this regard. Inquest panchnama was drawn. Dead body was sent for postmortem examination, which was performed and after concluding the investigation, the Investigating Officer having collected sufficient evidence against the present appellant and his co-accused, Hasubhai alias Ashok Chamanlal Makwana, filed the chargesheet against them in the Court of Metropolitan Magistrate. The Metropolitan Magistrate committed the case to the City Sessions Court. The case was registered as Sessions Case No.358/1991. Ultimately the case came up before Additional City Sessions Judge (Court No.8).

2.2 Charge was framed at Exb. 3 as stated above. The accused persons pleaded not guilty to the charge and claimed to be tried.

2.3 Considering the evidence led by the prosecution, learned Additional City Sessions Judge came to the conclusion that the prosecution could not establish the charge in respect of offence punishable under Section 120B or Section 302 read with read with Section 34 or Section 302 read with Section 114 of IPC against the co-accused Hasubhai alias Ashok Chamanlal Makwana. The learned Judge also observed that the prosecution could not establish the charge under Section 135 of the Bombay Police Act against any of the accused persons, but found that the prosecution was successful in establishing charge punishable under Section 302 of IPC against the original accused No.1, who is the present appellant and convicted him as stated above.

3. Aggrieved by the said judgement and order, present appeal is preferred by original accused No.1, present appellant, on various counts stated in the memo of appeal. The appellant is represented by the learned Advocate Mr.Anilkumar M. Verma appearing with Mr.Tirmizi. The appeal is opposed to by the learned APP, Mr.H.L. Jani.

4. Mr.Verma submitted that the prosecution case was founded on the version of five eye-witnesses, out of which, three eye-witnesses have not supported the prosecution case. These three eye-witnesses were independent witnesses, who were running the fast food stall. The two witnesses, who supported the prosecution case namely complainant Deepak Kantilal and PW-5 Umesh Bhikhubhai Patel are interested witnesses and chance witnesses. Their deposition, therefore, calls for a

close scrutiny. Mr. Verma submitted that if a close scrutiny is given to the evidence of these witnesses, it would clearly indicate that a possibility of them not being the eye-witnesses could not be ruled out. He submitted that there are a number of discrepancies, which individually may not be significant, but the cumulative effect thereof would shake the version given by those witnesses.

4.1 Mr. Verma in order to substantiate his contentions, has drawn attention of this Court to the fact that the conduct of the witnesses supporting the prosecution case is unnatural. PW.4-Deepak, though he happens to be the brother of the deceased, takes no steps either to rescue the victim, or to raise any shout at the time of the incident. He simply sits and then follows the appellant, rather than trying to rescue his brother. Mr. Verma submitted that after failing in catching the assailants, witnesses Deepak and Umesh returned to the place and found that the deceased, Hemant Kantilal Patel is lying on the road. Instead of trying to help him or to arrange for his medical treatment, they go to the police for lodging complaint. It is also an unnatural conduct. And the third fold of the contentions of Mr. Verma in this regard is that although there was a police chowky nearby the place of the incident, they go to the police station, rather than approaching the police at the chowky. Mr. Verma submitted that the conduct of these eye-witnesses is, therefore, not natural.

4.2 It is vehemently contended by Mr. Verma that the evidence emerging from the Inquest Panchnama, Postmortem Report and the Doctor's evidence goes contrary to each other. He submitted that as per the Inquest report froth had come out of the mouth of the deceased, whereas the Postmortem Report indicates that there was no discharge from the mouth. The Doctor's evidence also shows the same thing.

4.3 It was argued that the incident occurred soon after the deceased and the accused had taken some refreshments as per the prosecution case. However, the Postmortem note indicates that the stomach was empty.

4.4 The eye-witnesses improved their version while deposing before the Court and stated that they were sitting at the N.K. Bhaji Pau Stall, whereas initially either in the complaint or in the statement before the police, neither of the two witnesses has said that they were sitting at the N.K. Bhaji Pau stall. Not only

this, neither the panchnama of the place of incident, nor the map indicates existence of any such fast food stall.

4.5 Mr.Verma, therefore, contended that keeping all these discrepancies in the deposition of the eye-witnesses, the possibility is that they are got up witnesses and they may not have seen the incident. These aspects have been overlooked by the trial Court and, therefore, benefit may be given to the appellant before this Court.

5. Mr.Verma submitted that the prosecution has not been able to establish any motive for the appellant to cause death of the deceased. In light of this lacuna in the prosecution case, the appellant may be given a clean chit and acquitted.

6. By way of an alternative submission, Mr.Verma submitted that even if the prosecution case is accepted at the face value, considering that there was no motive for the appellant to cause death of the deceased; considering that only one blow was given by the appellant to the deceased; considering that the deceased could move for a distance of about 330 ft. after the injury was caused; and considering the prosecution had not led any other evidence to indicate that the appellant had intention of causing death of the deceased, the appellant may be given the benefit of a lesser punishment, as the case would fall under Section 304 Part-II of IPC and not under Section 302 of IPC. He, therefore, urged that the conviction may be altered accordingly by allowing this appeal.

7. The learned APP, Mr.H.L. Jani has opposed to the appeal. According to Mr. Jani, when there is direct evidence of eye-witnesses, lack of motive is of no virtue to the defence, where the prosecution established the guilt through direct evidence. Mr. Jani submitted that different persons react in different manner in a given set of circumstances and only because the eye-witnesses did not react in a particular manner, their depositions cannot be disbelieved, unless it is shown that the depositions are not trustworthy even otherwise. Mr. Jani submitted that the discrepancy about the absence of froth in the mouth of the dead body or a stomach being empty slip into insignificance in light of the un-shaken deposition of the two eye-witnesses. Their presence is accepted even by the witnesses, who did not support the prosecution case. Mr. Jani submitted that, although only one blow is given by the appellant, the size of the weapon used, the force with which the blow is inflicted

and the manner in which the injury is caused go to indicate that it was a clear case of murder and the case cannot be considered as one punishable under Section 304 of IPC. Mr. Jani submitted that the appeal, therefore, may be dismissed.

8. We have scanned the record and proceedings.

Mr. Verma has also taken us through the evidence which we have considered in light of the contentions raised before us. The prosecution has examined all the five eye-witnesses. PW-1 to PW-3 are the three brothers, who were running the Jagannath Bhaji Pau Stall. They did not support the prosecution case and with the permission of the Court, they have been declared hostile. Their depositions are at Ex.9, 10 and 11. However, PW-2, Mukesh in his deposition at Ex.10 half-heartedly supported the prosecution case to the extent that he saw the appellant with a dagger in his hand.

9. The complainant Deepak Kantilal Patel, PW-4

(Ex.19) states that he and his friend Umesh Bhikhubhai were sitting at a stall near Kankaria. That stall was N.K. Bhaji Pau. He clearly states that after some time, present appellant arrived at Jagannath Bhaji Pau in company of his brother Hemant Kantilal Patel in an auto-rickshaw. They were sitting on chairs while taking refreshments. At that time, the present appellant rose from his chair, went behind Hemant Kantilal Patel, drew out a knife from under his shirt and while standing behind Hemant Kantilal Patel, inflicted on Hemant a blow in the abdomen. Hemant Kantilal Patel, therefore, got up and started running towards Hanuman Temple. The appellant went to his rickshaw and ran away. He (PW-4), therefore, ran to his scooter to chase the appellant, but he could not start the scooter immediately. After the scooter started, he chased the appellant on his scooter along with his friend Umesh sitting on the pillion seat. But they could not catch the rickshaw. They, therefore, returned to the spot to find that his brother Hemant Kantilal Patel was lying on the road. Noticing that there was no movement, he felt that his brother had expired and, therefore, he and Umesh went to the Kagdapi Police Station. He says he had noticed the number of the auto-rickshaw. The witness has been cross-examined at length. It was suggested that the deceased had a liquor bottle in his pocket that his mouth was smelling of liquor about which he pleads ignorance. He has been cross-examined on his conduct at the time of the incident and he says that he did not rush on seeing the appellant draw a knife and inflict a blow and immediately explains that before he could do anything,

the assailant had escaped. He admits that he had not raised any shouts. A suggestion was made that the deceased was a drunkard, which is denied by him. He was cross-examined on the topography of the area particularly in connection with the location of N.K.Bhaji Pau. Stall. But nothing turns on that.

10. PW-5-Umesh Bhikhubhai (Ex.21) also supports the prosecution case. He narrates the same story as the complainant, as far as the incident is concerned. He has also been cross-examined at length, but in substance, nothing appears to have been brought out to render his deposition unbelievable or doubtful, particularly regarding the incident.

11. In our opinion, there is no reason to disbelieve the evidence of PW-4 and PW-5, namely Deepak Kantilal and Umesh Bhikhubhai respectively, who clearly implicate the present appellant. Some discrepancy is bound to creep into the deposition of witnesses, due to lapse of time, due to individual capacity of observation and individual character in reacting to a given set of situation. Unless it is shown that the discrepancy is of a vital character, which goes to the root of the case and renders the deposition unbelievable in toto, unless it is shown that the witnesses may not have seen the incident or that they may not have been present at the place of the incident, such insignificant discrepancies deserve to be ignored as has rightly been done by the trial Court. Incident occurred when the complainant and the eye-witness were having their refreshments in another stall and when the appellant and deceased were also having refreshments at Jagannath Bhaji Pau stall. Everything was peaceful and calm when for the reasons best known to the appellant, he rises from his chair, goes behind the deceased, who was sitting peacefully, unaware about the likely assault, draws a dagger and inflicts injury from behind in the abdomen. The size of the dagger is also important. The size of the dagger was 15". The blade was 10" in length and the handle was of 5" in size. The dagger was hidden under the shirt worn by the appellant and with this dagger, injury was caused from behind while the deceased was sitting. The dimensions of the injuries are 3 c.m. x 1 c.m. x cavity deep. It was 9.5 c.m. above the umbilicus in the abdominal area. It had penetrated the bottom wall coils of intestine, through and through, and had cut inferior venacava at the level of thoracic vertebra No.12. These factors indicate nothing but the intention of the appellant of causing death of the deceased. The appellant goes with the deceased to the stall with a

dagger hidden under his shirt, peacefully sits with the deceased at the stall, places orders for refreshments and then quietly goes behind him, draws the dagger and causes injury in vital part of the body with such a great force without any cause of reason. All these factors would outweigh the factor of single blow, which is vehemently canvassed on behalf of the appellant by Mr.Verma while trying to bring the case under the umbrella of Section 304 of IPC, which is not possible for us to accept. In our opinion, with such overwhelming direct evidence of eye-witnesses, discrepancies like presence or absence of froth, empty stomach in Postmortem against the case of deceased taking food just before incident, lose significance. No reasons are indicated to doubt the veracity of their evidence except that Deepak happens to be brother of the deceased and Umesh happens to be his friend. They have no quarrel or dispute with appellant and as such have no reason to falsely implicate the appellant. There are absolutely no reason to discard the deposition of these two eye-witnesses.

12. We do not see any patent or latent defect committed by the trial Judge, which would call for any interference at our end while he recorded conviction and sentenced the appellant to life-imprisonment. We are in agreement with the reasons adopted by and conclusion arrived at by learned Addl. Sessions Judge, City Sessions Court, Ahmedabad.

13. Mr.Verma has relied on a number of decisions of the apex Court or this Court to support his case that because there is one injury caused by the appellant the case may be considered as one falling under Section 304, I.P.C. rather than Section 302, I.P.C. We have gone through the decisions to find that the judgements were rendered in facts of each such case and in no such case injury was caused in such a cool, calm and well-composed manner as is the case before us. In most of the cases, the incident have occurred on the spur of the moment and only one injury was caused unlike the present case. The decisions, therefore, will not help the appellant.

14. For the reasons stated herein above, in our view, the appeal does not merit acceptance and the same, therefore, deserves to be dismissed. Appeal is dismissed. Judgement and order dated 13th May, 1993 passed by the learned City Sessions Judge in Sessions Case No.358 of 1991 is hereby confirmed.

(A. L. Dave, J.)

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